

# **Exhibit 1**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
-----x

TIMOTHY O. SONUGA,

Plaintiff,

v.

06 Cr. 1751 (AKH)

SECRETARY MICHAEL CHERTOFF,

Argument and Decision

Defendant.  
-----x

New York, N.Y.  
August 9, 2007  
4:20 p.m.

Before:

HON. ALVIN K. HELLERSTEIN

District Judge

APPEARANCES

K.C. OKOLI, ESQ.  
Attorney for Plaintiff  
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MICHAEL J. GARCIA  
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Southern District of New York  
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JOSEPH PANTOJA  
Assistant United States Attorney

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1 (Case called)

2 THE CLERK: In the matter Sonuga v. Chertoff.

3 Parties, please state your name for the record.

4 MR. OKOLI: May it please the Court, K.C. Okoli,  
5 appearing for the plaintiff.

6 MR. PANTOJA: Your Honor, Joseph Pantoja, Assistant  
7 United States Attorney, for the defendant Michael Chertoff,  
8 Department of Homeland Security.

9 THE COURT: Good afternoon. Let me recite the facts  
10 as I understand them from the submissions of the parties.

11 First, this lawsuit has been brought under Title VII  
12 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 and  
13 following, complaining that the plaintiff was not promoted by  
14 the department of customs and the Department of Homeland  
15 Security.

16 There was an EEOC investigation in 2003 instigated by  
17 the plaintiff. During the pendency of that investigation,  
18 plaintiff again applied for promotion and was not given the  
19 position, and complains that the position was not given because  
20 of retaliation. Subsequent to the case, in April of this year,  
21 plaintiff was promoted to the grade that plaintiff sought.

22 Defendant moves for summary judgment. Plaintiff asks  
23 for leave to take the deposition of John Leonard, an official  
24 in the Department of Homeland Security. I told Mr. Okoli that  
25 I would deal with that issue in the context of the present

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1 motion.

2 This is the background. The plaintiff is Timothy  
3 Sonuga. He is 62 years old. He was born in Lagos, Nigeria,  
4 attended high school in Nigeria, came to the United States in  
5 1971, earned a bachelor's degree in 1976 from Southern Illinois  
6 University, and then a master's degree from that same  
7 university in management and public administration in 1978.  
8 Throughout he has pursued different courses to gain proficiency  
9 and background in various tasks that he was performing for the  
10 Department of Homeland Security.

11 The defendant is the secretary of the Department of  
12 Homeland Security, Michael Chertoff. The case also involves  
13 various other people:

14 The director of the New York-Newark area and plaintiff.  
15 Sonuga's fourth line supervisor Kathleen Haage-Gaynor;

16 The director of field operations in New York office  
17 Susan Mitchell, who is Sonuga's fifth line supervisor and was  
18 responsible for personnel recommendations made by Haage-Gaynor.  
19 So Susan Mitchell is the direct supervisor of Gaynor;

20 John Leonard, the chief of summary management at the  
21 office of field operations in Washington, D.C., a person who  
22 appears to have a policy position of oversight responsibility  
23 over field directors such as Mitchell.

24 The jurisdiction of this court arises from 28 U.S.C.  
25 sections 1331 and 1343 as a case arising under the laws or

1 Constitution of the United States.

2 Sonuga began employment with the United States customs  
3 in 1989 as an import specialist. He worked in that capacity  
4 for seven years and then was promoted to entry specialist team  
5 leader in 1996. He functioned between 1996 and April 2007 in  
6 that capacity as an entry specialist team leader, first  
7 operating in the World Trade Center, and, after the terrorist  
8 bombing of the center, thereafter in New Jersey.

9 The position of entry specialist team leader is said  
10 to be a technical position with no official supervisory duties  
11 and is classified as grade 12 or lower. Sonuga had a grade 12  
12 classification and alleges that he was much involved in  
13 instruction, teaching, leadership, and other aspects that  
14 entailed supervisory responsibilities. But the job itself was  
15 considered a technical position.

16 On February 24, 2003, he learned that he had not been  
17 selected for promotion to grade 13, which was the  
18 classification for the next higher position of supervisory  
19 customs entry specialist. He complained to the EEOC on March  
20 26, 2003, filing his complaint a few months later, on July 12,  
21 2003. Sonuga complained that two younger females of European  
22 descent had been selected to the two vacant positions, and he  
23 complained against Mitchell and Haage-Gaynor, who were very  
24 much involved at the present time as well.

25 In October 2004, while his complaint was pending, two

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1 vacancies opened for grade 13 supervisory import specialist  
2 positions. The supervisory position in grade 13 has many  
3 similarities to Sonuga's position in grade 12, but it is said  
4 that the grade 13 position emphasizes management and leadership  
5 skills and functions.

6 In November 2004, a month later, the agency issued a  
7 vacancy announcement notifying employees that there were two  
8 vacancies for supervisory import specialist soliciting  
9 applications. The next month, on December 16, 2004,  
10 Haage-Gaynor recommended to Mitchell, her supervisor, two  
11 individuals as in her opinion best qualified to fill the open  
12 slots of supervisory import specialist.

13 One recommended person was Sonuga. A second was a  
14 younger person, a white male, Salvatore Ingrassia. Sonuga  
15 testified to the EEOC that she wrote a memo on December 16,  
16 2004, in which she considered Sonuga to be the better qualified  
17 applicant to fill one of the positions.

18 Sonuga did not get the position. Mitchell asserts --  
19 Mitchell again is Haage-Gaynor's supervisor -- that between the  
20 opening in October 2004 until March of 2005 the agency was  
21 moving forward on a long-pending personnel issue regarding a  
22 third position, a field national import specialist. This was  
23 also a grade 13 position.

24 But the Department of Homeland Security considered  
25 that the people who filled that position were doing the same

1 kinds of activities that were done by supervisory import  
2 specialists and were not doing the added characteristic for the  
3 field national import specialist of preparing binding  
4 classification and rulings.

5 Since they were not performing that additional work,  
6 the agency, in a letter of March 2000 to the relevant federal  
7 employee union, announced its intention to eliminate almost all  
8 the positions of field national import specialist by selecting  
9 the people who filled those slots for reassignment to open  
10 supervisory import specialist positions, the very position that  
11 Sonuga aspired to obtain.

12 This was the tension that confronted Mitchell and  
13 Haage-Gaynor. The position they considered open and which  
14 Sonuga Ingrassia wished to fill by promotion had also been  
15 designated for lateral transfers of people already occupying  
16 grade 13 who were doing a job that the Department of Homeland  
17 Security largely wished to cancel, therefore freeing those  
18 people who occupied that position soon to be canceled for  
19 lateral reassignment.

20 The lateral reassignment had to be in the same grade,  
21 if it was open, and therefore the position of supervisory  
22 import specialist held an attraction to those who were going to  
23 be transferred from the previous position they occupied of  
24 field national import specialist.

25 In January 2005 there were 19 grade 13 employees in

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1 the New York area and within easy commuting distance of the New  
2 York area who were excessed from the position of field national  
3 import specialist and who were available for transfer to fill  
4 the two vacancies of supervisory import specialist. Five of  
5 these thirteen people were in the Newark area, and the balance  
6 and several more were in the JFK area.

7 Mitchell testified that she held up making any  
8 selections for the two vacancies as supervisory import  
9 specialist until she heard from her boss Leonard regarding what  
10 would be the case with the excessed position of field national  
11 import specialist.

12 On February 14, 2005, the EEOC denied the complaint  
13 that Sonuga had filed in 2003 when he was denied promotion from  
14 his grade 12 position of entry specialist team leader. Three  
15 weeks later, on March 9, 2005, Mitchell participated in a  
16 conference call with John Leonard in which they agreed that  
17 they would move forward with the plan to laterally transfer the  
18 field national import specialists into the two vacant  
19 supervisory import specialist positions.

20 On March 10, 2005, the next day, Leonard sent an email  
21 to Mitchell and others instructing them to move forward as was  
22 discussed in the previous day's telephone conversation. He  
23 asked for a status report on the actions taken with regard to  
24 filling the supervisory import specialist vacancies with field  
25 national import specialists.



1 On March 15, 2005, a few days later, the supervisory  
2 import specialists were filled with two grade 13 employees who  
3 previously had been field national import specialists: Michael  
4 Opper and Kevin Gordon. Accordingly, Sonuga and Ingrassia were  
5 not selected for promotion.

6 On April 4 Sonuga discovered that he had not been  
7 selected when he saw an email sent to all employees advising  
8 them that Opper and Gordon were filling the vacancies. On  
9 April 21, 2005, he began EEO counseling regarding the failure  
10 to promote him to one of the two vacant slots, and he filed a  
11 formal complaint on June 23, 2005.

12 On December 2, 2005, EEOC denied Sonuga's claim, and  
13 on March 6, 2006, a little over a month later, Sonuga filed the  
14 complaint in this court. His complaint is timely and it raises  
15 the issues that he has been complaining about. He seeks  
16 compensatory damages of \$2 million, punitive damages of \$2  
17 million, injunctive relief, and fees and costs.

18 Let me pause for a moment. Mr. Okoli, have I  
19 substantially gotten the facts right as stated?

20 MR. OKOLI: No. There are a few things. For  
21 instance, the last one, the EEOC never denied his claim. He  
22 asked for them to make a decision without a hearing and give  
23 him the right to sue.

24 THE COURT: I'm sorry. So there was no denial by the  
25 EEOC with a right-to-sue letter?

1 MR. OKOLI: Right, with regards to the termination.

2 THE COURT: Thank you for correcting me.

3 MR. OKOLI: It may be minor, but . . .

4 THE COURT: No, no. I stopped to be corrected, and I  
5 thank you for correcting me.

6 MR. OKOLI: The master's degree is from a different  
7 university. I believe you said it was from the same  
8 university.

9 THE COURT: I think the important point here is that  
10 he deserves to be commended for his diligence in improving  
11 himself educationally and in his job. That's the reason I  
12 noted that.

13 MR. OKOLI: You referred to Ingrassia's position as a  
14 promotion. Ingrassia was not being promoted. He was selected  
15 because he was already a level 13. Had he been selected, that  
16 would be a lateral move. So he was not in the same category as  
17 Mr. Sonuga.

18 THE COURT: That's correct. But he was another  
19 applicant for the position, and Haage-Gaynor favored Sonuga to  
20 fill that position until she learned of the lateral transfers  
21 of grade 13 from the field national import specialist position?

22 MR. OKOLI: That's correct.

23 THE COURT: Mr. Pantoja, have I gotten anything wrong  
24 from your point of view?

25 MR. PANTOJA: Just one clarification. With respect to

1 the two individuals, the field national import specialists who  
2 ultimately were selected to fill the vacancies, I think you  
3 mentioned or suggested that the supervisory import specialist  
4 position, because it was a grade 13 position, appealed to them  
5 because it was of a similar grade and therefore the lateral  
6 transfer was appealing to them. The transfers were involuntary  
7 in that these two individuals were not consulted.

8 THE COURT: I understand.

9 MR. PANTOJA: So it could very well be that they might  
10 not have opposed it, that they welcomed it, but we don't know.  
11 All I know is that the agency thought it would be desirable and  
12 it was appealing to the agency to fill these two positions with  
13 these two lateral FNIS placements.

14 THE COURT: Thank you.

15 MR. PANTOJA: Thank you, your Honor.

16 THE COURT: Let me go on to the operative legal  
17 standards. I need not discuss the standards on a motion for  
18 summary judgment. They are well known and the cases are well  
19 known. In the Title VII context, although cases are often  
20 fact-intensive, I still have to go through the usual type of  
21 analysis with regard to these kinds of discrimination claims,  
22 namely, the burden-shifting analysis of the McDonnell Douglas  
23 case as elaborated by other cases in this circuit, particularly  
24 Tomka v. Seiler Corp., 66 F.3d 1295, decided in 1995; Terry v.  
25 Ashcroft, 336 F.3d 128, decided in 2003; and many other cases.

1 It seems to me clear that Sonuga is proficient,  
2 proficient in the sense of competent, to fill the position he  
3 aspired to be promoted to, and indeed he has been most recently  
4 appointed to that position.

5 Having made out that case and shown that he is in a  
6 protected classification, which I find, the burden shifts to  
7 the defendant to articulate a legitimate, nondiscriminatory  
8 reason for the adverse employment action of which plaintiff  
9 complains. I hold that defendant has done that by showing that  
10 the preference was given to employees already filling a grade  
11 13 category and shifting them involuntarily, as Mr. Pantoja  
12 states, to occupy a different position.

13 The position they occupied, field national import  
14 specialist, was being largely closed out, and the position to  
15 which they were transferred of supervisory import specialist,  
16 also in grade 13, had two spots available, and the two  
17 particular employees involuntarily were transferred to fill  
18 those slots, closing the slot to which Sonuga aspired. That  
19 constitutes a nonpretextual, nondiscriminatory reason why  
20 Sonuga was not promoted.

21 The burden then shifts back to the plaintiff again.  
22 Plaintiff must show sufficient evidence to raise a triable  
23 issue to the effect that the reason given by the defendant was  
24 a pretext in that in truth and in fact there was discrimination  
25 in the form of retaliation for having exercised a right given

1 to him by the statute, that is, seeking counseling and  
2 complaining to the EEOC. With regard to that point, Mr. Okoli,  
3 I find that there is no sufficient evidence in the record, but  
4 I wish you to argue that point.

5 I find also that there is no reason to have a  
6 deposition of John Leonard at this particular point in time,  
7 because the position that he would take, namely, that the grade  
8 13 position employees were involuntarily transferred, is  
9 documented in the record and there is no reason to gain  
10 redundant information.

11 Mr. Okoli.

12 MR. OKOLI: Yes, your Honor. Your Honor, we need to  
13 be very clear about what the protected activity here comprises.  
14 It is not just simply the filing of the complaint. In fact,  
15 Title VII, 42 U.S.C. 2000e-3 includes also not only the making  
16 of a charge but, quote, where a person has, quote, participated  
17 in any manner in an investigation proceeding or hearing.

18 I say "hearing" advisedly. Your Honor, the hearing  
19 continued until February 14th, when a decision came down. So  
20 Mr. Sonuga fully participated in a hearing. His protected  
21 activity is not just the simple fact that he complained about  
22 discrimination but that he fully participated, testified,  
23 continued, and pursued to hearing to its final conclusion.

24 THE COURT: I accept that point. When I said that he  
25 complained, that meant necessarily that an investigation

1 resulted and all of this was protected activity under Section  
2 2000e-3 subparagraph (a).

3 MR. OKOLI: Yes. The significance of the conclusion  
4 of the hearing is that I submit that that is the time from  
5 which you begin to measure, not when the complaint was filed.  
6 He could have withdrawn at any point. He could have withdrawn  
7 his complaint or abandoned the complaint. But he was assiduous  
8 in pursuing the complaint until the final conclusion, including  
9 a hearing, which resulted in termination.

10 THE COURT: But an employee who participates in  
11 protected activity doesn't get a guarantee of promotion.

12 MR. OKOLI: I considered that, your Honor. I'll come  
13 to that.

14 Your Honor, if we accept that, then we go to the fact  
15 that in the record before you there is not one shred of  
16 document to show that the Department of Homeland Security or  
17 Susan Mitchell did anything about the transfer or discussion  
18 relating to the transfer of field national import specialist  
19 between May 2000 and March 9, 2005, a hiatus of almost five  
20 years. Nothing happened.

21 The testimony by her immediate supervisor, that is,  
22 Kathy Haage-Gaynor, is that it takes a maximum of eight weeks  
23 from the time that the recommendation is made to when  
24 permission is effected. She also further testified that since  
25 Ms. Mitchell became the director of field operations, she had

1 never, never refused to follow any recommendation by her except  
2 in Sonuga's case.

3 Furthermore, the record, there are documents showing  
4 that promotions involving Susan Mitchell had been accomplished  
5 within anywhere between 6 days and 25 days of the  
6 recommendation being made, between 6 days and 25 days for  
7 supervisory positions such as the ones under consideration.

8 If we take the outside limits, which is just the  
9 say-so of Kathy Haage, which is 8 weeks, instead of the 25 days  
10 which you see in documents before you, if you take those 8  
11 weeks, had Susan Mitchell taken timely action on the  
12 recommendation made to her on December 14, 2004, Mr. Sonuga  
13 would have been promoted at the latest by the end of January  
14 2005. Oh, no. Middle of February. Sorry. That would be  
15 eight weeks. Eight weeks would take us to the middle of  
16 February. That is if we were to believe, even though this  
17 Court doesn't make a credibility determination, if you were to  
18 accept that.

19 THE COURT: We are not involved with the first problem  
20 that Sonuga had.

21 MR. OKOLI: No. It is the retaliation that I'm  
22 dealing with.

23 THE COURT: Right.

24 MR. OKOLI: I am dealing with the retaliation.

25 THE COURT: You're making the point that he wasn't



1 promoted from 2000. That was the first complaint.

2 MR. OKOLI: No, no. What I said was that the reason  
3 that Mitchell has given, Mitchell is saying the reason is now  
4 we had to lateral FNIS to this position. The point I'm making  
5 is that 2000 was the last document you will find in this  
6 record. That was the last document in which the FNIS was  
7 discussed. No other document entered this record until March  
8 2005.

9 THE COURT: That's correct.

10 MR. OKOLI: Yes. So in between that, what was going  
11 on? That matter was dead for all practical purposes. That is  
12 my submission. Otherwise, there would be some document  
13 showing --

14 THE COURT: I wouldn't infer that.

15 MR. OKOLI: Your Honor, now we're done looking at the  
16 timing. Now they decided they knew of that problem, they still  
17 went ahead and posted this position, the position that we are  
18 dealing with now. Haage-Gaynor recommended Mr. Sonuga together  
19 with Mr. Ingrassia. Ms. Mitchell did nothing about that  
20 recommendation for more than eight weeks, and there is nothing  
21 in the record showing what she was doing regarding the  
22 recommendation or regarding the FNIS. Nothing in the record.

23 The first thing in the record relating to FNIS that we  
24 see during the time that this recommendation was pending was an  
25 email of March 10th, which referred to a conversation of the



1 previous day, March 9th. By her own admission, she learned of  
2 the problem of the denial of the original claim in March. That  
3 was when she learned about it. She couldn't discriminate  
4 against us unless she knew, if she was delaying it on purpose,  
5 and there is nothing to indicate otherwise, because there is  
6 nothing to show what she was doing, that it was not a  
7 deliberate delay.

8           Once she knew that the original complaint had been  
9 dismissed, she was emboldened now to initiate a call to D.C.  
10 There is a document here in which Mr. Leonard took pains to  
11 explain to someone else that the initiative did not come from  
12 him, the initiative came from the field. Who is the director  
13 of field operations in the field? Susan Mitchell. So why  
14 would she wait? What was the purpose of waiting five years,  
15 doing nothing?

16           THE COURT: What initiative are you talking about?

17           MR. OKOLI: The initiative of moving, filling lateral  
18 transfer of FNIS to SIS position.

19           THE COURT: She was responding to Leonard's directive.

20           MR. OKOLI: That's what I'm saying. Leonard himself  
21 clarified in a document -- let's take two documents here. One  
22 is a letter, an email, referring to a conversation of March  
23 9th --

24           THE COURT: Right.

25           MR. OKOLI: -- in which Susan may have participated.

1 Then there is Exhibit 9 to the declaration of Timothy Sonuga,  
2 which is an email from Leonard to another gentleman Carl in  
3 which he was explaining that the move of FNIS was not  
4 headquarter mandated, it was field office initiated.

5 Basically, what she was saying is that it wasn't their idea.

6 THE COURT: Where do you see this? Show me where the  
7 document says that. It says here, "Yes, field national import  
8 specialists have been placed into NAM." I don't know what NAM  
9 means.

10 MR. OKOLI: Yes, in other ports.

11 THE COURT: -- "positions in other ports. Bottom  
12 line, until FNIS's go away, they'll be placed into alternate  
13 staffing positions in comparable GS13 jobs, SIS first choice,  
14 NAM second choice. We will not approve any actions for new  
15 GS-13 announcements until this accomplished. Finally, until  
16 the realigning plan is fully blessed and implemented, which  
17 will be soon, these movements are field office issued, not  
18 headquarter mandated."

19 I don't know what you do there. Obviously, the junior  
20 supervisor who was given responsibility is responding to what  
21 her headquarters tells her she has to do.

22 MR. OKOLI: But it was her that told the headquarters  
23 they wanted to do this. Remember the conversation, the  
24 earliest reference after 2000. There is nothing, no document  
25 in this record.

1 THE COURT: I understand that.

2 MR. OKOLI: It references a conversation.

3 THE COURT: Mr. Okoli, governments are not swift.

4 Governments don't win races. They are very slow.

5 Bureaucracies are not swift.

6 MR. OKOLI: Your Honor, let's look at the timing.

7 THE COURT: I take your point. There is a coincidence  
8 in time between the date of announcement of EEOC that the prior  
9 hearings and investigations and complaints are closed and a  
10 ruling comes down adverse to Sonuga and the action that's taken  
11 denying Sonuga the appointment to supervisory import specialist  
12 and giving it to other GS-13's who were being involuntary  
13 transferred from a closed-out position, but not every  
14 coincidence in time raises a prima facie case.

15 MR. OKOLI: Your Honor, I will be the first to concede  
16 that. But when there is coincidence after coincidence, somehow  
17 there was this delay beyond the time that that was normal as we  
18 know it, by their own account. She did nothing about this  
19 position within eight weeks. That's one coincidence. Not  
20 until she heard that Mr. Sonuga's original complaint had been  
21 denied, that was when she then calls headquarters.

22 THE COURT: Before that she even recommended Sonuga,  
23 indicating that she was not interested in keeping him down.  
24 But there was no action taken because action was paralyzed  
25 because of the problem that was created by closing out the FNIS

1 position.

2 MR. OKOLI: Your Honor, I don't know how to  
3 characterize this. She says that, and we don't see any  
4 document to support this paralysis of action, not one shred of  
5 document. Do we expect her to say, yes, I did this? Of course  
6 she would say things that are self-serving. What was the  
7 document in this record to show that there was any paralysis of  
8 action between 2000 and 2005 and all of a sudden now, once this  
9 happened, she calls?

10 Besides, your Honor, even here there is something,  
11 that is incorrect. This document says we will not approve any  
12 actions for new GS-13 announcements to the computer by G-12's  
13 until this is accomplished. Your Honor, they still haven't  
14 lateralled out every FNIS, but my client is now a level 13, so  
15 this is not even true. This is not even true. They will not  
16 put in new people until the laterals everywhere. My client is  
17 now level 13, and we know there are still FNIS's all over the  
18 place. Now, we see conflicting information coming from highly  
19 placed people in customs.

20 THE COURT: Because he got his employment, we should  
21 infer that previously it was a retaliation that caused him to  
22 not get the appointment? If they were retaliating, why would  
23 they give him an appointment now, when there were other FNIS's  
24 floating around?

25 MR. OKOLI: I wish I could answer that, your Honor,

1 the question why they were retaliating. The fact is that the  
2 man is imminently qualified. You can only do so much.

3 THE COURT: No, it says he is not.

4 MR. OKOLI: When you run out of vacancies, you have to  
5 do the obvious. Hence, he was recommended by Haage. But then  
6 Mitchell did not want to go along with the recommendation and  
7 sat on the recommendation beyond what is reasonable according  
8 to the --

9 THE COURT: There is not a shred of evidence that  
10 suggests retaliation as the motive for Mitchell's inactivity,  
11 and there is every indication that he was prompted by the need  
12 to place 13 people who were filling a position that was now to  
13 be canceled.

14 Mr. Okoli, I have read all your papers and I hear your  
15 argument. I think the coincidence in time is not sufficient.  
16 I cannot see any evidence of discrimination based on  
17 retaliation which can raise a triable issue of fact, and I  
18 grant the government's motion to dismiss the complaint.

19 There are no issues to be tried. There is no reason  
20 to take the deposition of Mr. Leonard. The events that came  
21 out are clear. The reason for the denial of promotions had  
22 been fully approved by the government, namely, the surfeit of  
23 candidates who were being involuntarily transferred from a  
24 grade 13 position that was being closed out.

25 Thank you very much. A summary order will follow.

(Adjourned)

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